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Nos. 00-596, 00-597 (8)

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In The

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A., INC., ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE NEWSPAPER ASSOCIATION OF AMERICA, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, DOW JONES & COMPANY, INC., MAGAZINE PUBLISHERS OF AMERICA, INC., and THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici Curiae are newspaper and magazine publishers, journalists and citizens with a deep commitment to the values of free speech.[1] They support substantial constitutional protection for commercial speech because advertising is both valuable speech in its own right, and a primary source of revenue enabling the nation's media to report news and disseminate other forms of speech universally recognized as vital to a fully-informed public and a functioning democracy. *Amici* also recognize that the values of free speech require unwavering support for the First Amendment rights of all speakers, including advertisers, even in cases where *amici* might disagree with the message being conveyed.

This is such a case. *Amici* do not condone the marketing practices of the tobacco industry. Indeed, *amici* include among their members publications that refuse to carry tobacco advertising. *Amici* also recognize the significant public health threat posed by tobacco use, and the interest the government has in reducing the incidence of youth smoking. But the First Amendment demands vigilance in protecting the rights of all speakers – including, and perhaps especially, the rights of unpopular speakers – against overreaching by government regulators. This Court's commercial speech jurisprudence requires that, no matter how justified the end, speech restrictions can be used, if ever, only as the regulatory tool of last resort.

Thus, *amici*'s interest in this proceeding, first and foremost, is that they support full protection under the First Amendment for the marketplace of ideas in which citizens are free to receive information and make their

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[1] Written consent of all parties to the filing of this *amicus* brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support. Individual *amici* are described further in the Appendix to this brief.

own informed decisions. America's media are active participants in that marketplace as speakers, as the means by which other speakers may be heard, and as a primary vehicle by which citizens receive information they need to participate effectively in public and private decision-making.

Second, *amici* support constitutional protection for commercial speech as an important part of the marketplace of ideas, and specifically the unimpeded flow of truthful, nonmisleading speech about lawful products. The media link speakers (including advertisers) and their audience (including consumers), and the First Amendment fosters the interests of both: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976). Moreover, as this Court has recognized, a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.

Third, advertising revenues enable the media to gather and report news, comment on political and other public events, and disseminate other forms of speech vital to the proper functioning of our democratic form of government. *Amici* are active participants in speech at the core of the First Amendment, but can remain so only because of the fundamental financial support provided by advertising. Restrictions on advertising undermine not only the market for the particular targeted product, but also the broader "marketplace of ideas" promoted by a viable, self-sustaining press.

Amici thus believe strongly that governmental efforts to advance policy goals by suppressing truthful, nonmisleading advertising must be subject to vigilant judicial scrutiny. The lower courts here inadequately performed this role, analyzing the Massachusetts regulations in a manner far too solicitous of the government. The courts

failed to hold the government to the First Amendment burden mandated by this Court's commercial speech jurisprudence. The First Circuit's decision, if allowed to stand, would permit curbs on speech without ***any*** evidentiary hearing, much less a weighing of the competing evidence, and without any searching inquiry of the effectiveness of alternative approaches that do not encroach on speech. The First Amendment requires far more.

SUMMARY OF ARGUMENT

In its recent commercial speech cases, this Court has emphasized the heavy burden the government bears, under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), to justify restrictions on truthful, non-misleading advertising. Although they would welcome the strict-scrutiny test called for by petitioners, *amici* believe *Central Hudson*, properly applied, easily mandates reversal of the decision below.

First, commercial speech is highly valued under the First Amendment for both its informational and expressive elements. Truthful advertising for legal products, even for disfavored products, is protected speech and may only be restricted in very narrow circumstances. This Court's recent commercial speech cases establish that the government bears a heavy burden to justify regulations on commercial speech, and that lower courts must be vigilant in holding the government to this burden.

Second, to satisfy *Central Hudson*'s requirement that an advertising restriction "directly advances" a substantial interest, the government must present admissible evidence and prove the regulation in fact serves the asserted goal. Here, the First Circuit upheld far-reaching restrictions on tobacco advertising based in part on a presumed link between tobacco advertising and tobacco use by minors – a type of presumption this Court has rejected as part of the *Central Hudson* analysis. Moreover, the courts

below failed to require the Attorney General to prove in fact that the regulations were effective. This Court should make clear that, when faced with competing evidence regarding the effectiveness of a commercial speech regulation, the trial court must (1) weigh the evidence and make factual findings; (2) demand that the government prove its case by at least a preponderance of the evidence; and (3) assure that evidence offered to show the link between advertising and the state interest meets normal standards of admissibility – meaning, in the case of scientific evidence, that it is both reliable and relevant.

Third, this Court should invalidate the Massachusetts regulations because the Attorney General has failed to show they are narrowly tailored to serve the asserted interest in reducing youth tobacco use. The ban on advertising within 1,000 feet of a school or playground was not carefully calculated, and impacts far more speech than necessary. Numerous equally effective alternatives exist that would impose less, or no, burden on petitioners' speech.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT THE FIRST AMENDMENT STRONGLY PROTECTS COMMERCIAL SPEECH.

This Court repeatedly has stressed the value and significance of commercial speech since specifically extending First Amendment protection to advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Commercial speech is worthy of protection for many of the same reasons that other forms of speech are protected:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at

> what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id. at 765 (citations omitted); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (commercial messages historically played "a central role in public life"). Commercial speech, like other speech protected by the First Amendment, is valued not only for the factual information it may convey, but also for the images and values it may express. "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).[2]

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[2] The First Circuit ignored these principles when it suggested that "tombstone" signs containing bare factual information could "alleviat[e]" the Massachusetts regulations' restrictions on other types of expression. 218 F.3d 30, 52. First Amendment protection for commercial speech is not limited to purely factual expression, however. So-called "image advertising" is equally valued. "Although public discourse includes specific debates about potential policy decisions, it is also an arena suffused with intense and contentious articulations of collective identity. Within public discourse,

For two decades, this Court has evaluated commercial speech restrictions under the four-part test set forth in *Central Hudson*. That test asks, first, whether the speech at issue concerns a lawful activity and is not misleading. If so, the restriction is permissible only if the government interest is substantial; the regulation directly advances the asserted interest; and the restriction is not more extensive than is necessary to further the interest. *Central Hudson*, 447 U.S. at 566. Earlier cases did not always apply these requirements in a strict fashion, and sometimes deferred to unsupported arguments that the government's interests were substantial and its chosen remedy effective. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding ban on locally directed advertisements for casino gambling based on suppositions as to legislative preferences). Perhaps for this reason, *Central Hudson* has been criticized as not sufficiently "straightforward and stringent." *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 184 (1999). Nonetheless, the Court has adhered to *Central Hudson* – and, in its most recent commercial speech cases, has committed to applying it with increasing vigor, particularly as to the third (direct and material advancement) and fourth (narrow

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heterogeneous and conflicting visions of national identity continuously collide and reconcile. These visions may or may not have immediate policy implications, but they are nevertheless highly significant for the general orientation of the nation. Visions of the good life articulated within commercial advertisements are relevant to this process. Any observer of the American scene would report that advertising deeply influences our sense of ourselves as a nation." Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L.Rev. 1, 11 (October 2000).

tailoring) prongs of the test. Under the recent cases, it is clear that the government bears a substantial factual burden to justify the particular restrictions imposed. *See Greater New Orleans*, 527 U.S. 173 (ban on broadcast advertising of private casino gambling unconstitutional under *Central Hudson*); *44 Liquormart, Inc.*, 517 U.S. 484 (1996) (ban on liquor price advertising failed under third and fourth prongs of *Central Hudson* test); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking prohibition on listing alcohol content on beer labels).

The stringent application of *Central Hudson* required by these cases has at least two facets of particular relevance here. First, the First Amendment scrutiny of advertising restrictions is no less demanding when the commercial speech at issue involves so-called "vice" activities that the government wishes to curtail. As Justice Stevens stated in *44 Liquormart*, "[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity,' " and "recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice." 517 U.S. at 515 (Stevens, J., plurality op.). In *Greater New Orleans*, the Court characterized *44 Liquormart* and *Rubin* as having "rejected the argument" that the government's power to prohibit a disfavored activity included the power to permit the activity but restrict advertising about it. *Greater New Orleans*, 527 U.S. at 182.

This emphatic rejection of any "vice exception" to *Central Hudson* comports with the well-recognized principle that courts must be vigorous in upholding First

Amendment rights of unpopular speakers. Throughout our history unpopular speech has served as a catalyst for wide protection of all citizens' rights to freedom of speech, and as a test of this nation's commitment to freedom of expression. *See, e.g., Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). One need not approve of the content of advertisements promulgated by tobacco companies to recognize that their right to express those messages must be protected under the same stringent constitutional framework that is applied to all forms of advertising for lawful products.

A second notable facet of the recent commercial speech cases is their recognition that courts must engage in a searching inquiry when evaluating advertising restrictions. Under *Central Hudson*, the government bears a substantial factual burden to demonstrate, with concrete and admissible evidence, that its regulations advance its asserted interest to a direct and material degree; the government's burden is not satisfied by mere speculation or even a reasonable belief that banning advertising will achieve the desired goal. *E.g., Rubin*, 514 U.S. at 487. As discussed more fully in section II.A, the courts in this case failed to hold the government to its burden, relying instead on impermissible deference to the presumed "reasonableness" of the regulations, and an inadequately examined evidentiary record. The First Circuit's resistance to employing the necessary inquiry demonstrates the need, yet again, for this Court to

instruct the lower courts that they may not rely on discredited modes of analysis, but instead must actively weigh the evidence in reviewing First Amendment challenges to commercial speech restrictions.

II. THE COURTS BELOW FAILED TO HOLD THE STATE TO ITS BURDEN OF PROVING THE CONSTITUTIONAL PERMISSIBILITY OF THE ADVERTISING REGULATIONS.

The First Circuit decision cannot be reconciled with the *Central Hudson* test, as interpreted and applied in this Court's recent commercial speech cases. Petitioners ask this Court to adopt a standard of review more stringent than *Central Hudson*. *Amici* would welcome this development, but do not believe it is necessary in order to decide this case. The decision below must be reversed because the First Circuit failed to hold the government to its burden, under the *Central Hudson* test, of providing concrete, empirical evidence that the Massachusetts regulations "directly and materially advance the asserted governmental interest," and are "not more extensive than necessary to serve the interests that support" them.[3] *Greater New Orleans*, 527 U.S. at 188.

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[3] The first prong of *Central Hudson* is not at issue: the Attorney General assumed below that petitioners' advertising is truthful, nonmisleading and involves a lawful activity. 218 F.3d at 43. *Amici* also do not dispute that the Attorney General's asserted interest of reducing tobacco use by minors is "substantial," and thus satisfies *Central Hudson*'s second prong.

A. The Government Must Establish that Its Commercial Speech Restrictions in Fact Directly Advance Its Asserted Interest in a Material Way.

This Court has made abundantly clear that the third *Central Hudson* factor imposes on the government a heavy burden of ***proving*** – through admissible evidence, as opposed to presumptions, speculation, or conjecture – that any restriction on commercial speech directly advances the asserted governmental interest in a material way.

> [T]he Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."

Rubin, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 770-71). "[T]his requirement is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.' " *Greater New Orleans*, 527 U.S. at 188 (quoting *Edenfield*, 507 U.S. at 771).

The courts below recited these standards, but utterly failed to apply them. The First Circuit upheld the Massachusetts regulations based, first, on so-called "common sense" presumptions that restricting advertising about tobacco products will decrease tobacco use by minors – ignoring this Court's recent and thorough discrediting of such presumptions as a means by which the government may satisfy its burden under part three of *Central Hudson*. The regulations also supposedly were upheld in light of

evidence submitted by the Attorney General. Both the First Circuit and the district court, however, failed to evaluate the reliability and admissibility of this evidence, and failed to weigh it against the contrary evidence submitted by petitioners. The lower courts permitted the Attorney General to meet his "burden" of proving direct and material advancement without holding him to ***any*** burden of proof – not even a preponderance of the evidence.

1. The Government Cannot Rely on Presumptions To Satisfy Its Burden of Proof.

In analyzing whether Massachusetts' far-reaching restrictions on tobacco advertising directly and materially advanced the state's asserted interest in reducing youth tobacco use, the First Circuit relied first and foremost on the Attorney General's "common sense" assertion that "advertising has some cause-effect relationship with consumption . . . " *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 48 (1st Cir. 2000). According to the First Circuit, the amount of money cigarette manufacturers "pour" into advertising indicates the manufacturers' belief that advertising has a "substantial effect on consumption of their product," and thus, that restricting tobacco advertising would reduce overall demand and, presumably, demand among youth. *Id.* This precise reasoning has been rejected in the Court's recent commercial speech cases, which hold that such presumptions about the alleged link between advertising and consumption do not serve as proof of "direct advancement."

The First Circuit cited *Central Hudson* itself for the presumption that "there is an immediate connection between advertising and demand." 218 F.3d at 48 (citing

Central Hudson, 447 U.S. at 569). The First Circuit, however, ignored the context in which *Central Hudson* arose. *Central Hudson* involved a monopoly provider of electricity seeking to engage in promotional advertising – that is, "advertising intended to stimulate the purchase of utility services." 447 U.S. at 559. By definition, there was a plausible connection between such advertising and the consumption of electricity: only one source existed for such electricity, and thus any increase in Central Hudson's sales necessarily would increase overall consumption.

This monopoly-specific concept lost its moorings in *Posadas*, in which the Court upheld an advertising restriction based on deference to an unstated and unsupported legislative belief that "advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Posadas*, 478 U.S. at 342. Suddenly, and without analysis, the link between advertising and consumption in a ***monopoly*** market became applicable to advertising in a ***competitive*** market – and the link could be presumed without evidence. *Posadas* left no room for a fundamental principle of marketing: that advertising in a competitive market might serve not to increase overall demand, but rather to solidify brand loyalty or to increase the advertiser's market share at the expense of competitors.

This Court has since disavowed *Posadas*, and with it the deference given to such presumptions.[4] The more

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[4] *E.g.*, *44 Liquormart*, 517 U.S. at 509 (Stevens, J., plurality op.) ("on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis"); *id.* at 531 (O'Connor, J., concurring) ("Since *Posadas* . . . this Court has examined more searchingly the State's professed goal, and the

recent cases recognize the reality that advertising often serves not necessarily to stimulate new demand, but to obtain a greater share of the existing demand. In *Greater New Orleans*, the government had argued that "promotional" advertising for casino gambling increased gambling, particularly among compulsive gamblers thought to be more "susceptible" to such advertising, and thus that banning broadcast advertisements would reduce the social costs of gambling. The Court disagreed:

> Assuming the accuracy of this causal chain, it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another.

527 U.S. at 189. The purported "common sense" notion that some link exists between advertising and overall demand cannot substitute for proof that the particular restriction chosen by the government directly and materially serves the regulatory goal. *Id.*; *see also 44 Liquormart*, 517 U.S. at 505-06 (Stevens, J., plurality op.) (while ban on price advertising for alcohol "may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will significantly reduce market-wide consumption"); *Rubin*, 514 U.S. at 487-88 (the "common sense" idea that "a restriction on the advertising of a product characteristic will decrease the extent to

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speech restrictions put into place to further it, before accepting a State's claim that the speech restriction satisfied First Amendment scrutiny.").

which consumers select a product on the basis of that trait" not sufficient to prove direct and material advancement of the asserted government interest).[5]

These cases closed what previously had been an avenue used frequently by the government to satisfy its *Central Hudson* burden – the presumption that less or no advertising in a particular medium must directly advance the government's interest in curbing consumption. The First Circuit, disregarding these roadblocks, ignored the possibility that tobacco manufacturers advertise to increase market share, not market-wide demand. It also ignored this Court's clear instruction that reliance on presumptions about the link between advertising and consumption, without reference to record evidence, have no place in the *Central Hudson* analysis.

2. The Courts Below Erred in Failing To Evaluate the Admissibility and Sufficiency of the State's Evidence.

Stripped of its impermissible reliance on presumptions, the First Circuit's conclusion that the Attorney General met his burden of showing "direct advancement" rests entirely on the "myriad sources" he submitted, some of which purport to show a causal link between tobacco advertising and tobacco use. 218 F.3d at 48. *Amici* do not

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[5] The First Circuit's citation (218 F.3d at 48) of *Rubin* as support for its finding that "common sense" supports the Attorney General's "direct advancement" burden cannot be squared with what *Rubin* actually says. *Rubin* ***rejected*** the government's argument that the alleged "common sense" link between a ban on displaying alcohol content on beer labels and consumer behavior was sufficient to further the government's asserted interest in preventing "strength wars" among beer producers. *Rubin*, 514 U.S. at 487-88.

here address the validity of the studies submitted by the government, nor attempt to weigh the government's evidence against the countervailing evidence offered by petitioners. They submit, however, that the ***court*** was obligated, and failed, to do so. The district court declined to consider petitioners' attacks on the validity of the Attorney General's evidence, finding that the "government is not required to satisfy the causal relationship [between advertising and reduced tobacco use] by a preponderance of the evidence." *Lorillard Tobacco Co. v. Reilly*, 84 F. Supp. 2d 180, 188 (D. Mass. 2000). The First Circuit noted the volume of evidence submitted by the Attorney General – "[n]early two thousand pages . . . of reports and surveys by governmental, scientific, and academic entities," 218 F.3d at 48 – but it made no independent factual findings. In effect, these courts held that an unexamined record of unverified studies, with no evidentiary hearing and no attempt to determine whether advertising in fact causes youth smoking, is sufficient proof of direct and material advancement.

This Court's commercial speech jurisprudence requires a greater degree of judicial vigilance and oversight than the courts below provided. Absent meaningful review, the Attorney General's studies are just so much paper. To defend a restriction on commercial speech, a governmental entity must prove "that the harms it recites are real and that its restrictions will ***in fact*** alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71 (emphasis added). This is only possible if three things happen. First, the court must make factual findings, after evaluating the government's evidence independently and weighing it against any conflicting evidence. Second, the government must show direct and material advancement

by at least a preponderance of the evidence. Third, the admissibility of the evidence must be established.

First, reversal is required in this case because the courts below failed to hold an evidentiary hearing or weigh the competing evidence. The causal link between the advertising restriction and the asserted goal must be established as a factual matter. The court is obligated to evaluate the evidence independently – and not simply defer to the government's speculation or conjecture regarding the reasonableness of the restrictions. *Id; accord Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 143 (1994). In other First Amendment contexts, this Court has emphasized the need for "independent judgment of the facts bearing on an issue of constitutional law." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 666 (1994) (Kennedy, J., plurality op.) (quoting *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989)). *Turner* involved a challenge to regulations requiring cable systems to carry local broadcast signals. Remanding the case for additional judicial findings of fact, the Court stated:

> [U]nless we know the extent to which the must-carry provisions ***in fact*** interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. Finally, the record fails to provide any ***judicial findings*** concerning the availability and efficacy of "constitutionally acceptable less restrictive means" of achieving the Government's asserted interests.

Id. at 667 (emphasis added, citation omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) and *Sable*, 492 U.S. at 129)). Similarly, the Court last term relied on a district court's detailed factual findings to

strike down restrictions on sexually-oriented cable television programming. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878 (2000). The government asserted the restrictions were necessary to combat the problem of "signal bleeding" in scrambled programming; the district court found as a factual matter, and this Court affirmed, that the government's evidence contained no hard proof that the problem was widespread. 120 S.Ct. at 1889-90 ("When First Amendment compliance is the point to be proved, the risk of non-persuasion – operative in all trials – must rest with the Government, not with the citizen. . . . Unless the District Court's findings are clearly erroneous, the tie goes to free expression.").

This Court's recent commercial cases confirm the need for judicial fact-finding as to whether the challenged restriction directly advances the government's interest in a material way. *See 44 Liquormart*, at 517 U.S. at 505-06 & n.17 (Stevens, J., plurality op.) (rejecting government speculation, in face of contrary evidence, that ban on price advertising furthered asserted interest); *Rubin*, 514 U.S. at 490 ("anecdotal evidence and educated guesses" held insufficient to overcome "the weight of the record"); *Edenfield*, 507 U.S. at 770-71. In *Greater New Orleans*, the government regulator itself recognized the need, after *Rubin* and *44 Liquormart*, to factually connect the casino advertising ban to a reduction in gambling: the FCC proposed, as an alternative to finding the statute unconstitutional, that the case be remanded to permit it to "build a record" of more fully developed facts showing the statute's effectiveness. 527 U.S. at 189 & n.6.[6]

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[6] This Court declined the FCC's invitation – not because further facts were unnecessary, but because even a more fully developed record would have been insufficient to demonstrate the effectiveness of the advertising ban in light of the many

The courts below failed to engage in the requisite judicial fact-finding regarding the Massachusetts regulations. Most glaringly, the district court – the appropriate place to determine, in the first instance, whether the regulations in fact directly advance the government's asserted interest – flatly refused to consider the petitioners' "challenge [to] the sufficiency of the Attorney General's showing. . . . " 84 F. Supp. 2d at 187. In response to petitioners' "challenge to the accuracy or conclusions of the studies" purporting to show the link between underage smoking and advertising, the court found that "[t]he government is not required to satisfy the causal relationship by a preponderance of the evidence. . . . 'Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation.' " *Id.* at 188 (quoting *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1313 (4th Cir. 1995), *vacated*, 517 U.S. 1206 (1996)).[7]

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statutory exceptions. 527 U.S. at 189 & n.6 (also noting government had been given "ample opportunity to enter the materials it thought relevant" after prior remand).

[7] The district court also relied on *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated*, 518 U.S. 1030 (1996). 84 F. Supp. 2d at 188-89. Both Fourth Circuit opinions relied heavily on *Posadas* and its now-discredited deference to the allegedly reasonable belief of legislative bodies. This Court remanded both cases for reconsideration in light of *44 Liquormart*; in both instances the Fourth Circuit affirmed. *Penn Advertising*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Anheuser-Busch*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). *Amici* believe the Fourth Circuit cases on which the district court

The district court's refusal to weigh the competing evidence was not corrected by the First Circuit. Like the district court, the First Circuit too declined to engage in the necessary judicial fact-finding regarding the efficacy of Massachusetts' advertising restrictions. The First Circuit relied on *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) to justify reliance on anecdotal evidence and unexamined studies in lieu of a careful weighing of the conflicting evidence. 218 F.3d at 46. But *Florida Bar* is distinguishable: there, the evidentiary record mustered by the state in support of a restriction on attorney solicitations "was noteworthy for its breadth and detail," and was "at no time refuted, save by the conclusory assertions that the Rule lacked 'any factual basis.' " 515 U.S. at 627-28. The instant case involves a vigorously disputed record: the Attorney General's evidence was directly challenged by evidence showing "no correlation or causal relationship . . . between advertising and tobacco use." 218 F.3d at 48, n.10.[8] The courts below simply ignored the weight of this Court's authority – which, as discussed

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relied, like *Posadas*, "erroneously performed the First Amendment analysis." 44 *Liquormart*, 517 U.S. at 509 (Stevens, J., plurality op.).

[8] Additionally, as Justice Thomas has observed, this Court's decisions support unfettered "dissemination of information about commercial choices in a market economy." The occasional departures from strict application of this principle have come in cases in which the government's interest was in ensuring consumer protection against fraud or overreaching, rather than indirect regulation of the underlying activity. 44 *Liquormart*, 517 U.S. at 520-21. (Thomas, J., concurring). *Florida Bar* was such a case, implicating the government's interest in protecting consumers from overreaching attorneys. Here, in contrast, the government admittedly is interested in altering behavior.

above, requires a searching inquiry of the evidence of the sort not performed here.

The First Circuit gave extensive attention to studies showing the health risks posed by youth smoking. 218 F.3d at 44-47. But *Central Hudson*, properly applied, requires the Attorney General to show not just that tobacco use is harmful to minors; he must show that the advertising restrictions actually do something to materially alleviate the problem. The court relegated this crucial First Amendment inquiry to a footnote: it recognized the competing evidence regarding the link between advertising and use, but held that "the fact that there may exist differences of opinion on this issue is insufficient to deprive Massachusetts of its ability to enact regulations based on a well-founded conclusion that advertising restrictions will reduce tobacco use among young people." *Id.* at 48 n.10. The court misperceived its duties: where speech rights are at issue, a mere "well-founded" belief is insufficient, and "differences of opinion" must be tested in court, by a weighing of the evidence.

Moreover, the evidence the First Circuit does discuss appears to relate only to cigarette advertising, yet is used as evidence justifying advertising restrictions on other forms of tobacco. *Id.* at 48-49. Most strikingly, the court found that with respect to cigars, outdoor advertising of the sort targeted by the Massachusetts regulations was "nearly nonexistent." It would seem to follow that any direct advancement of the Attorney General's asserted interest would be *de minimis* at best, and certainly not advancement "in a material way," sufficient to overcome the First Amendment rights of the cigar manufacturers. *See 44 Liquormart*, at 517 U.S. at 506.

Second, this Court should make clear that the government must prove direct and material advancement of its

interest by *at least* a preponderance of the evidence. As stated above, the district court expressly held that "[t]he government is not required to satisfy the causal relationship [between the advertising prohibition and curbs in youth smoking] by a preponderance of the evidence," because, in its view, the *Central Hudson* inquiry seeks merely to elicit whether lawmakers reasonably could have concluded the regulation would be effective. 84 F. Supp. 2d at 188. This is plainly erroneous.

This Court has never explicitly determined the evidentiary standard the government must satisfy to prove direct advancement. In other First Amendment contexts, the Court has held that limitations on speech rights must be justified by "convincing clarity." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (public officials claiming defamation must prove actual malice by clear and convincing evidence); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (same standard applies on summary judgment).[9] But even if a heightened standard of proof is not required, it is well established that "the Government carries the burden of showing" direct and material advancement. *Rubin*, 514 U.S. at 487; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). It follows that the government must prove the link between its interest and its speech restriction by at least a preponderance of the evidence; otherwise, the "burden" is no burden at all. Under the reasoning of the courts below, commercial speech bans could be upheld even if the

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[9] *See Addington v. Texas*, 441 U.S. 418, 424 (1979) (clear and convincing standard used where "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money," and "to protect particularly important individual interests in various civil cases.").

evidence shows it is more likely than not that the restriction ***fails*** to directly advance the government's interest, so long as the government reasonably believes it to be effective. An inquiry that defers to reasonable legislative belief amounts to mere rational-basis review, and is wholly at odds with the First Amendment protection this Court has granted to commercial speech.

Third, and finally, the courts below erred by failing to consider the admissibility of the evidence before it. The First Circuit did not expressly address this issue; the district court held that the government could satisfy the *Central Hudson* test even with normally ***inadmissible*** evidence because its burden was to show only that it had "a logical belief, when it crafted the regulation, that its regulation would directly advance its purpose." 84 F. Supp. 2d at 187-88 (citing *Penn Advertising*, 63 F.3d at 1323). As discussed previously, this Court has squarely rejected this kind of deference to putative legislative belief. The issue under *Central Hudson* is not whether the legislature rationally could have believed its regulation would be effective. Rather, the issue is whether, ***in fact***, the restriction directly advances the regulatory end. *Edenfield*, 507 U.S. at 770-71. It follows that where, as here, scientific studies and surveys are relied on to establish this fact, their admissibility and credibility should be evaluated under normal evidentiary standards. At a minimum, a district court must assure that scientific or other specialized testimony is both relevant and scientifically reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). A party may not rely on scientific evidence unless it is sufficient to support the conclusions for which it is offered. *General Electric Company v. Joiner*, 522 U.S. 136 (1997). Applied here, the

Attorney General cannot satisfy his burden to show direct advancement merely by submitting scientific "evidence" the admissibility of which has never been evaluated. Nor can he rely on studies that address only the health risks of youth smoking without reference to the role, if any, played by advertising. This Court should reverse, and make clear that scientific evidence offered as the factual basis for overcoming an advertiser's First Amendment rights must be reviewed for relevance and reliability.

B. Massachusetts Adopted Speech Regulations More Restrictive Than Necessary To Achieve Its Asserted Interest.

The fourth *Central Hudson* factor requires that the government prove that its restriction on speech is "no more extensive than necessary to serve the interests that supports it." *E.g., Greater New Orleans*, 527 U.S. at 188. In its recent cases, the Court has affirmed that the government must be put to its proof to demonstrate narrow tailoring between its means and its end:

> While the State need not employ the least restrictive means to accomplish its goal, the fit between means and end must be "narrowly tailored." The scope of the restriction on speech must be reasonably, though it need not be perfectly, targeted to address the harm intended to be regulated. The State's regulation must indicate a "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

44 Liquormart, 517 U.S. at 529 (O'Connor, J., concurring op.) (citations omitted); *see id.* at 508-11 (Stevens, J., plurality op.); *Greater New Orleans*, 527 U.S. at 188; *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993).

The First Circuit cited none of these recent articulations of the standard under part four of *Central Hudson*. Instead, it reached back more than a decade to rely solely on *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). 218 F.3d at 50. *Fox* suggested the government's burden is to show only that it acted "reasonab[ly]" in choosing its remedy from among the panoply of regulatory alternatives, and appeared to emphasize the ease with which the government may satisfy the test. *Fox*, 492 U.S. at 480.[10] Subsequent decisions have made clear, however, that the question is not whether the speech ban was reasonably chosen from among a number of options. Rather, the question is whether a speech regulation can be justified as the regulatory tool of choice in light of available alternatives that could have addressed the substantial government interest without impinging on speech. This Court has indicated it will not uphold commercial speech regulations when there "are practical and nonspeech related forms of regulation . . . that could more directly and effectively alleviate" the asserted harm. *Greater New Orleans*, 527 U.S. at 192 (instead of banning casino advertisements, government could have prohibited gaming on credit, limited bets, or imposed other, non-speech restrictions).[11]

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[10] *Fox* cites only *Posadas* for this proposition – a citation the First Circuit omits, without saying so, when it quotes *Fox*. 218 F.3d at 50 (quoting *Fox*, 492 U.S. at 480).

[11] *Greater New Orleans* "erases lingering concern that [*Fox*] had seriously weakened the final element" of *Central Hudson*,

The First Circuit failed to hold the Attorney General to his burden of showing the restrictions were narrowly tailored. First, it is evident that Massachusetts engaged in no "careful calculation" when it enacted the ban on outdoor tobacco advertising within 1000 feet of a school or playground – a zone that accounts for nearly all of the land area in the state's largest cities. To the contrary, the state chose that zone simply because the same restriction was imposed by the Food and Drug Administration under regulations it adopted in 1996.[12] The FDA regulations, and whether they were narrowly tailored, were not considered by the courts below. The First Circuit justified its refusal to scrutinize further the regulatory "fit" on the ground that the tobacco industry has agreed voluntarily not to advertise within 500 feet of schools, and that it would be "splitting hairs" and "judicial second-guessing" to analyze whether a smaller buffer zone would have been equally effective to further the state's interest. 218 F.3d at 50. By refusing to consider whether a restriction half as burdensome on speech as the one enacted would have been adequate to serve the governmental interest, the court effectively relieved the Attorney General of his burden under part four of *Central Hudson*.

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making plain that "the narrow tailoring contemplated by part four of the test does not give the government an anything-goes license to regulate. The hurdle created by the *Central Hudson* test's final element remains a tall one for the government to clear." Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 Am. Bus. L.J. 587, 644 (Summer 2000).

[12] This Court recently struck down these 1996 regulations because the FDA lacked authority to enact them. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The absence of any "careful calculation" by Massachusetts is even more apparent with respect to the indoor advertising restrictions. The First Circuit demanded virtually no evidence of a fit between means and end. First, the FDA regulations on which Massachusetts based its statute did not contain this indoor advertising restriction. 218 F.3d at 51. Also, the Court noted "misgivings" regarding the effectiveness of the rule that point-of-sale signs within the 1000-foot zone had to be placed at least five feet off the ground, but upheld this speech restriction anyway because it was "hardly unreasonable for the Attorney General to determine that stores within 1000 feet of schools and playgrounds . . . will also be more likely to receive minors as customers." *Id.* The court fails to explain, because it cannot explain, how the Attorney General's belief demonstrates "narrow tailoring."

Next, the First Circuit eschewed any consideration of alternative means by which Massachusetts could have reached its stated goals of curbing youth smoking. The court concluded that, "in light of *Fox*," it need not examine the potential effectiveness of alternatives such as criminalizing underage tobacco use or enhancing enforcement of existing laws. *Id.* at 51. The First Circuit simply ignored this Court's more recent commercial speech cases, which hold that the availability of "practical and nonspeech related forms of regulation" to achieve the same governmental interest is evidence that the fit between a speech restriction and the asserted goal is too imprecise to survive under the First Amendment. *Greater New Orleans*, 527 U.S. at 192; *see also 44 Liquormart*, 517 U.S. at 529 (O'Connor, J., concurring op.); *Rubin*, 514 U.S. at 491. Here, Massachusetts has other methods at its disposal that would effectively serve its interest in reducing illegal underage tobacco use. Most obviously, the

State can sponsor its own speech, educating young people about the dangers of tobacco use and warning tobacco sellers of the consequences they face for selling to minors. It could enact stiffer penalties for illegal sales. It could hire more personnel to enforce existing laws, in stores and in schools. Such alternatives would more directly address the problem of tobacco use by minors without depriving petitioners of their rights under the First Amendment.

Nor does the fact that "alternative modes of communication [are] left open to tobacco manufacturers and retailers" satisfy the Attorney General's obligation to show the regulations are narrowly tailored. 218 F.3d at 51-52. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). Specifically, the Massachusetts regulations cannot be upheld as a mere limitation on the "mode" or manner of communications, because they are not content-neutral. A restriction on the place or manner of speech is impermissible if it is "based upon either the content or subject matter of speech." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). Here, the regulations are not content-neutral; only advertising for tobacco products, and no other sort of advertising, is barred from the 1000-foot zone. Indeed, restrictions on commercial speech are, by definition, based on content; thus, they cannot be upheld as mere time, place or manner limitations. *See Discovery Network*, 507 U.S. at 429-30 (commercial speech restriction content-based and must be narrowly tailored, "regardless of whether or not it leaves open ample alternative channels of communication. . . . "); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (rejecting

argument that ban on residential "for sale" signs was constitutional because "it restricts only one method of communication").

Finally, the First Circuit erred in finding the advertising restrictions are sufficiently narrow, despite their extensive reach, because they "are focused on areas where children are most likely to be present." 218 F.3d at 53. According to the First Circuit, "the principal function of advertising is to propose a commercial transaction, in this case the sale from tobacco products – which, where minors are concerned, is already illegal in Massachusetts." *Id.* at 51. If the advertising in question were in fact proposing that minors purchase tobacco, this point might be well taken. But a limitation on advertising a lawful product cannot be justified on the ground that it is illegal for minors to use it, or by defining a message to the general public as "advertising to children." To the contrary, this Court has rejected such a "lowest common denominator" approach to speech protection. *See, e.g., Bolger*, 463 U.S. at 73 ("the government may not 'reduce the adult population . . . to reading only what is fit for children' ") (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Nor may the government avoid strict application of First Amendment principles to protect the interests of persons who are allegedly more susceptible to misuse of the advertised product or service. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1998) (holding that government may not bar adults from receiving "indecent" but constitutionally protected speech in an asserted effort to protect children).

The First Circuit recognized the case law holding it unconstitutional to "deny communications to a large number of adults for the sake of protecting children." 218

F.3d at 52. The court concluded, however, that this principle applies only to "expressive speech, rather than commercial speech. . . . " *Id.* The First Circuit's reasoning, which would justify near-total bans on advertising for any product lawful for adults but not children, is foreclosed by this Court's decisions invalidating just such restrictions. *E.g., Greater New Orleans*, 527 U.S. 173; (casino gambling advertising); *Bolger*, 463 U.S. 60 (mailed advertisements for contraceptives). The Court should once again reaffirm that government or judicial solicitude for children cannot substitute for proof that commercial speech restrictions are narrowly tailored, and no more extensive than necessary, to address a proven harm.

In sum, the First Circuit misapplied *Central Hudson*'s narrow tailoring requirement. It refused to examine the effectiveness of the particular speech restrictions chosen by Massachusetts. It failed to consider possible non-speech alternatives. It relied on an overly broad view of how much speech the government may ban in the name of "protecting the children." Finally, the state admittedly did not carefully calculate the effectiveness of the regulations; it simply adopted the prohibitions contained in the former FDA rules. Such a regulatory scheme cannot survive constitutional scrutiny under a proper application of *Central Hudson*.

CONCLUSION

While the Attorney General's goal in reducing tobacco consumption by minors is laudable, his chosen means cannot be justified. The First Circuit upheld the regulations without holding the Attorney General to his

burden of proving that the regulations directly, and materially, further the stated goal. Moreover, the state failed to demonstrate that the regulations are narrowly tailored in light of the alternatives. The decisions of the courts below cannot be affirmed without doing violence to this Court's commercial speech jurisprudence, which counsels that advertising restrictions must be justified with proof, and can only be used, if at all, as the regulatory tool of last resort. *Amici* respectfully urge the Court to reverse the First Circuit's judgment, and once again to unequivocally instruct the lower courts on the stringent First Amendment standard that must be applied to commercial speech restrictions.

Respectfully submitted,

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APPENDIX

IDENTITY OF INDIVIDUAL AMICI CURIAE

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